Filed 5/17/10 Marriage of Martene CA4/3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of CHRISTOPHER P. and JENNIFER S. MARTENE.	
CHRISTOPHER P. MARTENE, Appellant, v. JENNIFER S. MARTENE, Respondent.	G041944 (Super. Ct. No. 08D001710) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard Vogl, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Christopher P. Martene, in pro. per., for Appellant.

No appearance for Respondent.

* * *

Appellant Christopher P. Martene (husband) appeals from a judgment dissolving his marriage to respondent Jennifer S. Martene (wife), awarding her custody of their children, and granting him supervised visitation. He contends supervised visitation was unwarranted, but he fails to provide a record reflecting any error. We affirm.

FACTS

Husband and wife were married in May 2004. Their first son was born in December 2004. They separated in February 2008, when wife obtained a temporary restraining order against husband. According to her declaration, husband had tried to rape her, was verbally abusive to her, and had hurt their son. Wife stated she was pregnant and worried husband would hurt the baby. Husband then filed for dissolution of marriage. The dissolution and domestic violence actions were consolidated.

Husband applied ex parte for an order awarding him custody of their son. Wife submitted a declaration in opposition. She stated husband had engaged in "long term emotional and physical abuse and erratic and dangerous behavior and attitude toward [her] and [their son], culminating on the night of February 10, 2008 with [husband's] forced rape of [her] in front of [their] son."

In March 2008, the court reissued the restraining order. It also temporarily awarded sole legal and physical custody of their son to wife and granted supervised visitation to husband. The matter was set for trial.

In the meantime, the court entered wife's default and each party's lawyer withdrew, leaving the parties to represent themselves. Also, the couple's second son was born in September 2008.

At the October 2008 trial setting conference, the court reiterated its interim orders regarding custody and supervised visitation and ordered a county paid child

custody evaluation. It continued the matter pending review of the child custody evaluation.

The parties, self-represented, appeared for trial on January 20, 2009, and were sworn in. The court noted the child custody evaluation had been completed, and declared a recess so wife could read the evaluation. After the recess, the court stated, "As I have indicated to you, I have not read this report. These reports are very helpful to the court. But we do not always follow them absolutely. [¶] Obviously I have to read the report. [¶] More than that, I will need to read the file before I make any rulings. [¶] Before I do that, of course I want you to tell me anything more you would want me to know before I rule in this case." The court noted wife was in default and urged her to consult a lawyer.

The court then stated, "I do not pretend to know this case. Besides what each of you have filed before, . . . is there anything more you would want me to know?" Husband replied, "No, Your Honor." Husband then answered the court's questions about his employment. The court asked him again, "Is there anything else you would want me to know?" Husband answered, "No. Not at the moment[, nothing] that is not already included in the paperwork." Wife told the court she wanted to move with the children to Utah.

The court directed the parties' attention to the recommendations in the child custody evaluation. Wife disagreed with a recommendation apparently concerning visitation, stating, "After the first eight visitations, it will be unsupervised. And I do not feel safe with him being alone with the baby." Husband responded, "I understand about the infant. I go along with the orders which are basically from [*sic*] if she had read them, it says for the first three years. [¶] They are to be supervised. The first eight weeks supervised by the mother. [¶] Second, I can do four hours supervised or without, whichever I prefer. I would have no problem with it being supervised with the infant.

That is no problem. [¶] I do not agree with the move to Utah." The parties made some additional statements, and the court took the matter under submission.

The court issued a statement of decision that day. It awarded sole legal and physical custody of the children to wife, allowed her to relocate, and granted supervised visitation to husband.

Two weeks later, husband filed an objection to the statement of decision. He stated he was "objecting . . . due to the court not considering or making determination on the 'multiple' Unfounded Children's Protective Services Investigations (CPS) nor the Partial Child Investigation also providing evidence the accusations being Unfounded. [He] would also include the findings of the Partial Child Investigation that report the allegations as Unfounded with the apparent reason for the allegations from [wife] towards [husband] to be financially motivated." (Emphasis omitted.) He asserted wife "has not provided any evidence of the allegations supporting any of [her] claims or accusations" of domestic violence.

Husband appeared in court on February 24, 2009, to submit a proposed judgment. Wife did not appear. The court found the proposed judgment did not conform to its statement of decision because it omitted the supervised visitation requirement. Husband stated, "I feel the monitored visitation was done off of hearsay evidence and also there is no physical evidence of anything happening in regard to that. [¶] I am not an attorney. [¶] When talking to other acquaintances, including the legal aid society, they said the bottom line is because of the no evidence and based around the findings of the state investigation, that I should write it more on those lines. [¶] That is why I proposed it the way I did, which is joint custody." Husband asserted wife "needs to file a response. She needs to file a declaration. [¶] She has not filed anything in court."

The court took the matter under submission. Later that day it entered a judgment awarding sole legal and physical custody of the children to wife and granting supervised visitation to husband.

DISCUSSION

Husband's opening brief is disjointed, but he appears to challenge the judgment's supervised visitation requirement. Basically, he asserts insufficient evidence warrants supervised visitation because wife's declarations were hearsay and the child custody evaluation concluded her domestic violence claims were unfounded. Wife failed to file a respondent's brief, so we will "decide the appeal on the record, the opening brief, and any oral argument by the appellant." (Cal. Rules of Court, rule 8.220(a)(2).)

Husband fails to show any reversible error. We are bound by "three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error." (*Fladeboe v. American Isuzu Motors Inc*. (2007) 150 Cal.App.4th 42, 58 (*Fladeboe*).)

Husband asserts the court wrongly relied upon wife's declarations, but the record shows no timely objection to them as hearsay or on any other ground. Husband filed his written objection two weeks after trial. "A . . . finding shall not be set aside, nor shall the judgment . . . based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." (Evid. Code, § 353.)

Husband also asserts the court wrongly disregarded the child custody evaluation, which concluded the domestic violence claims were unfounded, but he failed to include it in the record. Unable to review the evaluation ourselves, we must presume it supports the judgment.[1] (See *Fladeboe*, *supra*, 150 Cal.App.4th at p. 58.)

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[1] Because husband relies upon the child custody evaluation, we will assume it was properly admitted into evidence. (See Fam. Code, § 3111, subds. (a) ["The report may be considered by the court"], (c) ["The report may be received into evidence on

We know husband tried and appealed this matter without the benefit of counsel. Nonetheless, he "is not exempt from [appellate] rules because he is representing himself on appeal in propria persona. Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

Husband has had every opportunity to relate his side of the story and has done so in the trial court and on appeal. We have considered his contentions and addressed them in this opinion to the extent the record permits us to do so.

DISPOSITION

The judgment is affirmed. Wife shall recover her costs on appeal, if any.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.

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stipulation of all interested parties and is competent evidence as to all matters contained in the report"].)